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Supreme Court of the United States

No. 78-1360

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA.

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counter-Statement of Jurisdiction

Respondent Westmoreland County contends that the jurisdiction of the Supreme Court of the United States cannot be invoked under the United States Code, Title 28, Section 1257(3), as contended by Petitioner, for the reason that no valid federal or constitutional question is involved, and for the further reason that Petitioner failed to raise any such federal or constitutional issue before any of the state courts hearing this case below.

Counter-Statement of Constitutional Provisions, Statutes, and Rules of Court Involved

In addition to the constitutional provisions and statutes referred to in the petition for certiorari, Respondent Westmoreland County cites Title 28, United States Supreme Court Rule 23(f), which reads as follows:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Counter-Statement of the Questions Involved

I. Whether the jurisdiction of the United States Supreme Court may be invoked by Petitioner where the federal questions Petitioner alleges are raised for the first time in the petition for certiorari, never having been raised or argued at any stage of the proceedings before the state courts.

II. Whether it is within the statutory discretion of the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth Court and Supreme Court of Pennsylvania, to refuse to approve a lease between Respondent Westmoreland County and Petitioner for

mining coal on county lands where there were numerous irregularities in the process of bidding and awarding the proposed lease.

III. Whether the Pennsylvania Courts' exercise of statutory discretion in refusing to approve the lease to Petitioner because of irregularities in the bidding and awarding procedures raises any federal questions cognizable by this Court.

Counter-Statement of the Case

Respondent Westmoreland County adopts Petitioner's Statement of the Case with the following corrections of inaccurate statements or omissions:

The bid submitted by Respondent Weiss Brothers, Inc. provided for payment of $5.27 per ton of coal mined, or 13.17% of the sale price of the coal; the bid submitted by Petitioner Fred Fiore Coal Company provided for payment of $5.11 per ton or 21% of the sale price of the coal.

Contrary to Petitioner's Statement of the Case (p. 6), the contract awarded to Weiss Brothers, Inc. for drilling and test boring on the coal site at Westmoreland County was understood by all parties to the action to be an award of the coal lease to Weiss Brothers, Inc., with the understanding that if the results of the test boring were favorable, Weiss Brothers, Inc. was to submit a proposed lease agreement to the County Solicitor's office for approval of other terms.

Petitioner's Statement of the Case flatly asserts that the record of the hearing held by the Westmoreland County Court *en Banc* on April 1, 1977, and June 17, 1977, fails to disclose evidence of fraud, official misconduct, or arbitrary and capricious abuse of power in the award of the coal lease; however, the record affirmatively establishes evidence of

substantial irregularities including the County Commissioners' duplicate and inconsistent awarding of the lease in question and Petitioner's impermissible modification of its bid.

Finally, Respondent Westmoreland County disputes Petitioner's claim that the issues asserted in the petition for certiorari were raised before the courts below. In fact, the only issues raised below concerned the scope of discretion permitted the Pennsylvania courts in reviewing a proposed lease of county real estate and the sufficiency of the evidence presented to justify the Westmoreland County Court *en Banc* in denying approval of the lease in question.

REASONS FOR DENYING THIS WRIT

I. The jurisdiction of the United States Supreme Court may not be invoked by Petitioner where the federal questions Petitioner alleges are raised for the first time in the petition for certiorari, never having been raised or argued at any stage of the proceedings before the state courts.

Contrary to Petitioner's contentions, Respondent County of Westmoreland asserts that the instant case involves no federal questions, substantial or otherwise, and that, therefore, this Court has no jurisdiction to decide the questions involved herein (see discussion in Argument, Section III, *infra*). Further, assuming that federal questions are involved, we submit that Petitioner failed to raise these questions in any of the courts below and, thus, is precluded from raising them for the first time in a petition for certiorari. See *Tacon v. Arizona*, 410 U.S. 351, 35 L.Ed. 2d 346, 93 S.Ct. 998 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed. 2d 398, 89 S.Ct. 1162 (1969).

To insure that a party has, in fact, raised a federal question in the lower courts, this Court's Rules, Title 28 United States Code, United States Supreme Court Rule 23(f), require that in its petition for certiorari, Petitioner state the stage of the proceedings at which it raised the question, the specific method and manner it raised the question, the way the lower courts passed on the question, and specific quotations from the record where the question appears as would establish that Petitioner previously raised the question in a timely and proper fashion so as to furnish this Court with jurisdiction. The instant petition merely asserts generally that counsel raised the federal questions in argument, objections, and appeals, without specific reference to where in the record it raised these questions and without stating the way in which the lower courts passed on them. We submit that Petitioner failed to comply with Rule 23(f) because it was unable to do so.

Indeed, an examination of Petitioner's written requests for review submitted to the courts below substantiates that Petitioner never articulated any federal question prior to its petition herein. [See petition for certiorari, Appendices F and G; hereinafter all references to appendices refer to appendices in the petition for certiorari.] In addition, the fact that none of the Pennsylvania Courts' opinions in this case dealt with federal questions further substantiates this contention. [See Appendices B, C, D and E.] We submit, and the records will show, that Petitioner only raised the questions of the degree of discretion the Pennsylvania statute accorded the Westmoreland County Court of Common Pleas in reviewing the Westmoreland County Commissioners' proposed lease of the county's real property and the sufficiency of evidence presented at the evidentiary hearing to justify the court's refusal to approve the lease in question. In proceedings

before the Pennsylvania Courts, Petitioner never made the slightest allusion to any issues concerning the separation of powers, the alleged unconstitutional vagueness of the state statute, or the alleged deprivation of property without due process—questions that it now seeks to raise before this Court.

Although Petitioner may contend, albeit without force, that these issues were raised by inference from facts of the case, this Court has held that the assertion of a federal claim must be made unmistakably and not left to mere inference. *Thomas v. Iowa*, 209 U.S. 285, 52 L.Ed 782, 28 S.Ct. 487 (1908); *Mutual Life Insurance Co. of New York v. McGrew*, 188 U.S. 291, 309-310, 47 L.Ed. 480, 485, 23 S.Ct. 375 (1903). This Court has also held that the appellant must specify in the lower courts the clause in the Constitution under which it asserts a claim. *Mutual Life Insurance Co., supra; New York Central & Hudson River Railroad Co. v. City of New York*, 186 U.S. 269, 272-273, 46 L.Ed. 1158, 1160, 22 S.Ct. 916 (1902). Since Petitioner has patently failed to articulate any federal questions in the courts below, and thus, no lower court has had an opportunity to rule on such questions, Petitioner cannot, at this, the latest stage in the case, raise such questions. Accordingly, we respectfully request this Court to deny certiorari.

II. It is within the statutory discretion of the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth Court and Supreme Court of Pennsylvania, to refuse to approve a lease between Respondent Westmoreland County and Petitioner Fiore for mining coal on county lands where there were numerous irregularities in the process of bidding and awarding the proposed lease.

Contrary to the arguments of Petitioner, the scope of review by Pennsylvania courts in matters of this nature is not limited to fraud, official misconduct, bad faith, capricious actions or abuse of power. This strict standard is to be applied in cases where the courts are requested to enjoin certain actions of public officials who are performing their official duties. See, *e.g., Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A.2d 311 (1954) (action to enjoin eminent domain proceedings); *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960) (action to enjoin proceeding with plans for sewage treatment plant and related system). In such cases involving the exercise of their general equity powers, the courts refrain from substituting their own judgment and discretion for that of the administrators appointed by law to carry out specific governmental duties.

In the present case, however, the Pennsylvania Legislature has specifically directed that the courts should conduct a hearing and ". . . make such order and decree as shall seem right and proper . . ." Act of August 9, 1955, P.L. 323, § 2306 (16 P.S. § 2306). In its interpretation of this section the Pennsylvania Commonwealth Court, citing decisions of the Supreme Court of Pennsylvania, has twice said in the instant case:

> It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. *Parker v. Philadelphia*, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960). *However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well.* See *Baton Coal Company Appeal*, 365 Pa. 519, 76 A.2d 194 (1950), and *McKees Rocks Borough School District Petition*, 306 Pa. 285, 62 A.2d 20 (1948) (emphasis added).
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> [Appendix E, p. 39; Appendix B, p. 20-21]

The opinions of Judge Rodgers for the Commonwealth Court of Pennsylvania and Judge McCormick for the Court of Common Pleas of Westmoreland County clearly substantiate the existence of substantial irregularities in the procedures followed in awarding the lease in question, thereby justifying the courts' exercise of discretion in denying approval of the proposed lease.

After conducting an evidentiary hearing, the Westmoreland County Court *en Banc* made a factual finding that the actions taken by the County Commissioners on April 24, 1975, constituted an award of the coal lease to Weiss Brothers, Inc. as the "highest and best bidder in response to the advertisement soliciting bids" [Appendix C, p. 25]. Later, on July 24, 1975, the County Commissioners reversed themselves and awarded the coal lease to Petitioner, again allegedly as the highest and best bid. In itself this attempt to renege on Respondent Weiss Brothers' contract and make a second award of the lease constitutes a violation of Pennsylvania bid law, justifying court disapproval of the latter agreement with

Petitioner. Under Pennsylvania law, once bids are opened and one party is determined to be the best responsible bidder, the award must be made to that bidder or all bids must be rejected. *Schuck v. School District of Baldwin Township*, 296 Pa. 408, 146 A. 24 (1929); *Hibbs v. Arensberg*, 276 Pa. 24, 119 A. 727 (1923); *Louchheim v. Philadelphia*, 218 Pa. 100, 66 A. 1121 (1907). Once a contract was awarded to Weiss Brothers as best bidder, the Commissioners were barred from changing their minds and awarding the same contract to Petitioner.

The Westmoreland County Court *en Banc* found that this irregularity was further compounded by the County Commissioners' attempt on October 9, 1975, to petition the court for approval of the original lease of the coal to Weiss Brothers and their attempt on December 21, 1975, to withdraw all petitions for approval of leases to either Weiss Brothers or Petitioner. The court *en banc* found that this vacillation by the County Commissioners made it impossible for the court to determine which action should be recognized as the true discretionary decision of the County Commissioners. Thus, the court stated:

> The Court cannot in good conscience recognize the action of the Board of Commissioners of Westmoreland County on July 24, 1975, as being valid and disregard the actions of the Board of County Commissioners on April 25, October 9 and December 31 of 1975. To do so would amount to the Court substituting its discretion for that of the County Commissioners on the action taken by the Commissioners on all of the dates with the exception of July 24, 1975. It is the opinion of this Court that the various actions of the Board of County Commissioners, *i.e.*, on April 24, 1975, July 24, 1975, October 9, 1975 and December 31, 1975 were not consistent with each other nor are they consistent with the Petition and proposed agreement now before the Court.
>
> [Appendix C, p. 28]

Under such circumstances the Pennsylvania courts were certainly justified in determining that they should not lend their approval to the imbroglio created by the Commissioners' inconsistent actions.

The Westmoreland County Court *en Banc* found another irregularity in the fact that the royalty payment terms of the lease presented for court approval differed from the terms of the bid submitted by Petitioner. While Petitioner's bid offered payment of 21% of the sale price of the coal mined or $5.11 per ton of coal, its proposed lease terms were 21% of the sale price or $5.27 per ton of coal. Under Pennsylvania bid law such a modification of bid terms is impermissible, *Louchheim v. Philadelphia, supra,* especially under circumstances which led the Westmoreland County Court *en Banc* to determine that private negotiations had been entered into between Petitioner and the County Commissioners between the time of awarding the lease to Weiss Brothers and the subsequent award of the lease to Petitioner [Appendix C, p. 30].

The Commonwealth Court of Pennsylvania found that the circumstances presented too many uncertainties as to exactly what was awarded to Weiss Brothers by the County Commissioners' resolution of April 24, 1975, and as to the process whereby Petitioner's bid price of $5.11 per ton was changed to an award at the price of $5.27 per ton, and therefore concluded that the Westmoreland County Court *en Banc* had "exercised a sound discretion in refusing to approve the proposed lease to Fiore" [Appendix B, p. 20].

III. The Pennsylvania Courts' exercise of statutory discretion in refusing to approve the lease to Petitioner because of irregularities in the bidding and awarding procedures raises no federal questions cognizable by this Court.

Respondent Westmoreland County submits that no federal questions are involved in this case. Although Petitioner contends that broad constitutional principles, such as separation of powers and due process are involved herein, we submit that each of Petitioner's constitutional arguments is specious and wholly without merit.

Petitioner contends that the doctrine of separation of powers precludes the judiciary from disturbing an executive's decision absent fraud or unless the executive exceeds its authority. Assuming *arguendo* that this accurately states the proper constitutional relationship between the federal judiciary and federal executive branches of government, it is inapplicable to this case, which solely involves branches of state government. Nothing in the Federal Constitution mandates a separation of powers with respect to state branches of government. Thus, the only question in this case is whether the Pennsylvania statute, which grants the judiciary certain discretion in deciding whether to approve a lease, violates the Pennsylvania Constitution. Clearly, this case raises no *federal* question relating to the separation of powers.

Nor does this case raise any other federal questions. Petitioner contends that the Pennsylvania Courts' refusal to approve Petitioner's lease unconstitutionally impaired its contract with the Westmoreland County Commissioners. Initially, it must be noted that to succeed in its argument, Petitioner must show that it had a contract under the existing laws of the state, and that after the making of the contract, the state legislature passed a law impairing the prior contract. *Oshkosh Waterworks Co. v. City of Oshkosh,* 187 U.S. 437, 446,

47 L.Ed. 249, 253, 23 S.Ct. 234 (1903). The undisputed facts in this case establish that the existing laws of Pennsylvania required that the Westmoreland County Court of Common Pleas approve the tenative lease *before* it would be final and binding [Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, 16 P.S. § 2306]; since the court never approved Petitioner's lease, no enforceable contract ever existed between Petitioner and the Westmoreland County Commissioners. Thus, Petitioner never had a contract that could have been subject to unconstitutional impairment.

Assuming *arguendo* that a contract existed, the statute under which the Westmoreland County Court refused to approve the lease was in effect *prior to* the making of the alleged contract. This Court has specifically held that "the contract clause of the Constitution of the United States has reference only to a statute of a state enacted *after* the making of the contract whose obligations is alleged to be impaired". *Oshkosh Waterworks Co., supra,* 187 U.S. at 446, 47 L.Ed. at 253 (emphasis added). Thus, Petitioner's alleged contract could not have been unconstitutionally impairment by legislative enactment.

Moreover, as Petitioner concedes in its petition for certiorari, this clause of the Constitution only applies to *legislative* enactment of statutes after a contract has been made and not to changes in *judicial* interpretations of a statute after a contract has been made. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 6 L.Ed. 2d 386, 44 S.Ct. 199 (1923). Thus, assuming *arguendo* that the Pennsylvania courts modified their interpretation of the degree of judicial discretion accorded the courts by the statute involved herein, this action does not violate the constitutional prohibition regarding impairment of contracts. Accordingly, Petitioner's entire argument on this issue is disingenous and wholly without merit.

Petitioner's final and equally unmeritorious argument is that the statute on its face or as applied fails to set reasonably clear standards to be followed by the court for reviewing a proposed lease, in violation of the due process clause of the Constitution. In positing this void-for-vagueness contention, the only case Petitioner cites is *Smith v. Groguen,* 415 U.S. 566, 39 L.Ed. 2d 605, 94 S.Ct. 1242 (1974), a *criminal* case involving first amendment issues. Indeed, the entire void-for-vagueness doctrine rests on the due process theory that " 'men of common intelligence' not be forced to guess at the meaning of the *criminal* law". Smith, *supra,* 415 U.S. at 574, 39 L.Ed. 2d at 612 (emphasis added). This theory, although necessary to carry out the policy of strictly construing criminal statutes, is inapplicable to a *civil* statute, as involved herein.

Conclusion

It is submitted that this case involves no federal questions, and that even assuming *arguendo* that it does, Petitioner failed to raise any such federal questions in the courts below and, thus, is precluded from raising them before this Court. In any event, the Pennsylvania Courts appropriately exercised their sound discretion in refusing to approve the coal lease in question since there were numerous irregularities in the procedures of bidding, negotiation, and petitioning for court approval. For the reasons set forth in the foregoing Argument, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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County of Westmoreland.